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ABSTRACT

This paper examines how U.S. courts, particularly the Supreme Court, have applied constitutional law principles to Latino communities and individuals in three areas: public education, the status of Puerto Rico, and jury selection. Consistent with traditional views of American society as biracial (black and white), constitutional law discussions frequently focus only on liberty or equality. This paper shows examples of how courts have resisted constitutional challenges based on pluralism or have favored principles of equality over those of pluralism, and how resulting decisions have not protected Latino rights. Over the past century, Latinos have sought equal educational opportunities through desegregation, bilingual education, and challenges to school funding schemes. Efforts to improve educational conditions initially focused on breaking down segregation based on notions of equality, as Latino precursors to Brown v. Board of Education exemplify. In the Southwest, Mexican Americans emerged as a separate identifiable class, which greatly complicated the desegregation analysis. In addition, some Mexican American parents wanted to maintain a "critical number" of Latino students in particular schools as a necessary prerequisite for bilingual education programs. In Colorado, the Tenth Circuit Court mandated desegregation, ruling that bilingual education could not substitute for desegregation. This paper also discusses Supreme Court rulings that jury trials are not required in Puerto Rico and that Spanish-speaking bilinguals may be removed from a jury when they might challenge a translation of testimony in Spanish. (SV)

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EQUALITY V. LIBERTY V. PLURALISM: LATINOS IN AMERICAN CONSTITUTIONAL LAW

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Equality v. Liberty v. Pluralism: Latinos in American Constitutional Law

This paper examines how some courts, particularly the Supreme Court, have applied constitutional law principles in three areas (public education, the status of Puerto Rico, and jury selection), to Latino communities and individuals. While mentioning three competing values (equality, liberty, and pluralism), the focus is on pluralism.

Consistent with traditional views of American society as binary or biracial (black and white), constitutional law discussions frequently focus only on liberty and/or equality. The presence of different minorities in the United States has been difficult for constitutional law to assimilate. While early court cases show that Latinos initially focused on equality, pluralist concepts became more prevalent in the increasingly diverse American society. This paper shows examples of how the courts have resisted pluralist constitutional challenges and how these have frequently not effectively protected the rights of Latinos. Instead, pluralistic values sympathetic to Latino issues have been more successful

through legislation, regulations, and/or non-constitutional litigation.

1. Introduction: The Values

1.1. Liberty

Liberty in American constitutional thought is more appropriately defined as rational or ordered liberty. Constitutional liberty is not unfettered or limitless: it no longer encompasses the "right" to enslave other humans and has never included the right to kill absent extraordinary circumstances such as war or self-defense. Historically, liberty values in American constitutional law reflect the framers' preoccupation with religious and political repression and discrimination in Europe.

The textual embodiment of liberty is found throughout the Bill of Rights and especially in the First Amendment and the procedural guarantees. Consistent with the fear of governmental persecution or overreaching, the Constitution does two things principally: creates a structure of a limited federal government and provides a sphere of protection to individuals from infringement. Two quick points are worth making on the rights in the Constitution. First, they are negative rights, meaning that they

prevent the government from doing something, rather than requiring the government to affirmatively do anything. For example, while there is no affirmative "right to a job" in the Constitution, the Fifth Amendment does protects arbitrary confiscation of property by the government absent due process, which would prevent a person from earning a livelihood. Second, the rights secured in the Constitution initially applied only against the federal government. In other words, through the Fourth Amendment, pre-Reconstruction Americans were protected from unreasonable searches and seizures by federal officials but not from identical searches by state officials.

1.2. Equality

Equality in American constitutional law means equal treatment by the government. Historically, the primary focus has been slavery and the treatment of African-Americans. Textually, the constitutional cornerstone is the Equal Protection Clause of the Fourteenth Amendment. The balance of power in the federalist system changed radically with the Civil War and the "Reconstruction Amendments": the 13th (abolishing slavery), 14th[1],

[1] Amendment XIV reads in relevant part: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

and 15th (preventing infringement of the right to vote based on race, color, or prior condition of servitude). The extent of the shift in federal protections was a major constitutional debate in American constitutional law known as the "incorporation debate."[2] At issue was the extent to which the negative rights guaranteed by Bill of Rights applied to protect against actions by the states. While some favored a "Total Incorporation" position, the prevailing position applies only selected rights required by due process against the states.[3] Central to incorporation were racial minorities, particularly African-Americans.[4]

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enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[2] Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1194 (1992). JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER, AND CIVIL LIBERTIES IN MODERN AMERICA (1989).

[3] A more appropriate term would be "Selective Incorporation Plus" since cases like *Griswold v. Connecticut*, 381 U.S. 479 (1965)(right to privacy from state infringement recognized) and *In re Winship*, 397 U.S. 358 (1970)(beyond a reasonable doubt standard constitutionally required in criminal cases), the Court has followed an approach whereby "the justices generally identify these standards with the Bill of Rights, [although] they remained unconfined by this restraint." ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW, 84 (1990).

[4] MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS, 34-82 (1986).

1.3. Pluralism

Pluralism is a hybrid of equality and liberty, and invokes a concept of group participation or interests. Pluralism invokes "a plurality of competing interest groups and a diversity of rival interests-regional, social, economic, religious, and psychological."[5] Pluralism is a form of liberty involving mutual, separate, distinct, co-existing different groups. Pluralism differs from equality because although both contain a request respect, legitimacy and recognition in law and society, advocacy based on pluralism does not necessarily seek identical treatment. Although the Constitution does not have a "pluralism" clause, the "penumbra" of right in the Bill of Rights point to pluralism as a constitutional value.[6] Pluralism is deeply rooted in the American constitutional law tradition, and was discussed by James Madison in his famous Federalist Papers Number 10. As a practical matter, the Supreme Court has used the term pluralism primarily in cases involving religious minorities and the First Amendment.[7]

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[5] KARL W. DEUTSCH, JORGE I. DOMINGUEZ, HUGH HECLO, COMPARATIVE GOVERNMENT: POLITICS OF INDUSTRIALIZED AND DEVELOPING NATIONS at 62 (1981).

[6] *See e.g., Griswold*, 381 U.S. at 484.

[7] *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). For a well-expressed critique of the concept of pluralism regarding Latinos, see William V. Flores &

2. The Limits to the Quest for Equal Educational Opportunities for Latinos through Pluralism in Constitutional Law: Subordination to Equality

School desegregation and the attempt to reach equal educational opportunities have been a cornerstone of American constitutional law in the last half-century. Latinos have sought equal educational opportunities for nearly a century in various forms: desegregation, bilingual education, and challenges to school funding schemes. The relative success of these challenges has varied depending on many factors including the times and the size of the Latino communities at issue. However, in the courts traditional equality challenges have fared much better than pluralistic challenges, even when textually rooted in the Equal Protection Clause. Efforts to improve educational conditions initially focused on breaking down desegregation based on a notion of equality, as some of the Latino precursors to *Brown* exemplify. Over time, school equality issues relating to Latino

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Rina Benmayor, "Construing Cultural Citizenship" in LATINO CULTURAL CITIZENSHIP, at 9 (1997); and Blanca G. Silvestrini, "The World We Enter When Claiming Rights: Latinos and Their Quest For Culture" in LATINO CULTURAL CITIZENSHIP, at 46 (1997).

students became increasingly pluralistic in nature such as in the bilingual/bicultural education and school-funding context.[8]

2.1. The "Traditional" Road to *Brown*

In 1896 the Supreme Court made a landmark ruling in the context of public accommodations in train cars which constitutionally legitimized segregation in public schools for over a half a century.[9] The *Plessy* decision specifically held that "separate but equal" public accommodations pursuant to a Louisiana statute were constitutionally permissible. According to the Supreme Court, any badge of inferiority existed solely "because the colored race chooses to put that construction upon it."[10] In Justice Harlan's famous dissent in *Plessy*, he prophetically wrote, "the judgment this day rendered will, in time, prove to be quite as pernicious as the [*Dred Scott*] decision."[11] Nevertheless, Justice Harlan wrote the

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[8] Another good example of Latinos challenging unequal educational opportunities through equality and (italics) pluralism are the school financing cases, primarily those in Texas. *See e.g., San Antonio I.S.D. v. Rodriguez*, 411 U.S. 1 (1973); *Edgewood I.S.D. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). While equality is a central component of those cases, the emphasis away from integration and towards improvement of all schools, and in particular, putting the Mexican schools on solid economic footing and local control of the financing manifests a stronger pluralistic position.

[9] *Plessy v. Ferguson*, 163 U.S. 538, 544 (1896).

[10] *Plessy*, 163 U.S. at 551.

[11] *Plessy*, 163 U.S. 559 (Harlan, J., dissenting).

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majority opinion *Cumming v. Richmond County Bd. of Ed.*,[12] which held that preventing black children from attending high school was permitted in Georgia when the school board's decision to close down the black school was based on lack of funds, not intentional discrimination. During the next 50 years and especially after 1930, litigation campaigns incrementally dismantled *Plessy*.

2.2. The "Latino" Road to Brown: Mexican-American Desegregation Efforts in the Southwest Prior to 1954

Like African-Americans, Mexican Americans challenged racial segregation in public schools in the Southwest prior to *Brown*. In the Southwest, "Mexican schools" were (and still are) common.[13] "Mexican schools" were inferior and segregated.[14]

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[12] 175 U.S. 528 (1899).

[13] GUADALUPE SAN MIGUEL, "LET ALL OF THEM TAKE HEED": MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910-1981, AT 54-58, 117-121 (1987); MARIO T. GARCÍA, MEXICAN AMERICANS, 46-61 (1989); GEORGE I. SÁNCHEZ, CONCERNING SEGREGATION OF SPANISH-SPEAKING CHILDREN IN THE PUBLIC SCHOOLS (1951).

[14] Mexican children have long had unequal educational facilities and opportunities in comparison with Anglo children in Texas. SAN MIGUEL, "LET ALL OF THEM TAKE HEED" AT 74-86(1987); *See also* Jorge C. Rangel & Carlos M. Alcalá, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 Harv. Civ. Ri. Civ. Liber. Rev. 307, 311-19 (1972). Mexican-American organizations such as the G.I. Forum and LULAC used courts, the political electoral process, and other approaches to attempt to alter the inferior educational opportunities given to Mexican-American children. MARIO T. GARCIA, MEXICAN AMERICANS 1 (1989); SAN MIGUEL, "LET ALL OF THEM TAKE HEED", at 67-87. The 1960s and the increased number of Latinos in the Southwest and the United States altered the form, if not the nature, of attempts to address the educational inequities which persisted. Guadalupe Salinas,

Examples of the rationales given for the inferior facilities were that Mexican children came to school late in the fall term from the fields where they worked until October, and that there were language problems requiring segregation.[15]

One example of Mexican-American desegregation challenges is the 1930 *Salvatierra* case, where although a Texas appellate court found that intentional and invidious discriminatory practice of segregating Mexican children would violate the Equal Protection Clause, that *in that case*, Del Rio's formal segregation was based not on ethnicity but on "legitimate" pedagogical and educational purposes.[16] In 1946-47, the campaign for educational equality via desegregation received a boost from California federal courts holding that segregating Mexican children violated the Equal Protection Clause.[17] Other courts followed.[18] These decisions were based on an equality analysis.

Mexican-Americans and the Desegregation of Schools in the Southwest, 8 U. HOU. L. REV. 929 (1970).

[15] *I.S.D. v. Salvatierra*, 33 S.W.2d 790, 791-93 (Tex. Civ. App.—1930, writ denied).

[16] *Id.* at 796.

[17] *Westminister S.D. v. Méndez*, 161 F.2d 774, 779 (9th Cir. 1947).

[18] *Gonzales v. Sheely*, 96 F. Supp. 1004, 1008-09 (D. Ariz. 1951).

2.3. *Brown v. Bd. of Education* and *Hernández v. Texas*

In 1954, the Supreme Court in *Brown v. Bd. of Education of Topeka* overruled *Plessy* and held that segregated educational facilities were inherently unequal and in violation of the Equal Protection Clause.[19] The challenge against segregation of Mexican-American children in particular, and the impact of American constitutional law on Latinos in general, was also affected by another 1954 Supreme Court case, which is physically and literally immediately before *Brown* in the United States reporter. *Hernández v. Texas*[20] involved a Mexican-American's successful challenge of his criminal conviction because no Mexican-Americans had served on juries in Corpus Christi, Texas. As part of its ruling in reversing Pete Hernández's conviction, the Supreme Court held that Mexican-Americans in Texas, like African-Americans, are a "protected class" for equal protection purposes.[21] Once again, equality was the hallmark.

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[19] 347 U.S. 483, 495 (1954).

[20] 347 U.S. 475 (1954).

[21] *Id.* at 478-80.

2.4. Pluralism subordinated to equality in school desegregation: *Keyes*

Keyes v. School District No. 1., Denver, Colo.[22] illustrates some issues involving pluralism and Latinos in American constitutional law. *Keyes* is widely and incorrectly regarded as transporting desegregation "North."[23] In reality, *Keyes* did not take desegregation "North", but to the Southwest. The significance of desegregation going to the Southwest was the emergence of Mexican-Americans as the "third" group in a tri-ethnic scheme as a separate identifiable class. In the Southwest, the significant "Hispano" population's presence complicated the desegregation analysis. The lower court recognized that while "Hispanos have a wholly different origin, and the problems applicable to them are often different...One of the things which Hispanos have in common with the Negro is economic and cultural deprivation and discrimination."[24]

Fifteen years after *Brown*, the Denver School District tried to rescind some previously adopted desegregation measures. To

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[22] 413 U.S. 189 (1973) and its companion cases.

[23] *See* GERALD GUNTHER, CONSTITUTIONAL LAW, 738-40 (12th ed. 1991); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1492 (2nd ed. 1988).

[24] *Keyes v. School District No. 1*, 313 F. Supp., 61, 69 (D. Colo. 1970).

prevent the school board's resolution, Wilfred Keyes filed a class action lawsuit on behalf of his daughter Christi and other similarly situated children in 1969 seeking an injunction, which the court granted in July of that year. At the end of a trial in February of 1970, the district court found discrimination and set forth requirements to make the district unitary that included Spanish language training.[25] After an appeal to the Tenth Circuit, the *Keyes* case ended up before the Supreme Court.

In 1973, Justice Brennan wrote for the Supreme Court that although Denver never had laws forcing segregation, that segregation existed "de facto." Because of the three-way ethnic division in *Keyes*, unlike earlier desegregation cases, whether the district was dual or unitary depended on the role of "Hispanos."[26] The School District argued that there were "unitary" schools because schools having predominantly black and Hispanic students were not segregated. The African-Americans plaintiffs wanted to count Hispanics together with them to further their integration goals and to support a dual district finding. In deciding whether

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[25] *Keyes v. School District No. 1*, 313 F. Supp. 90, 99 (D. Colo. 1970).

[26] The relevance of the term "unitary" as opposed to "dual" district is that if a "unitary" district existed, there was effectively no further need for desegregation efforts.

"Hispanos" would be considered "white" or not for desegregation purposes and the unitary district issue, the Supreme Court held that although "Hispanos" were a different identifiable group for equal protection purposes, schools with predominantly black and Hispano students were nevertheless segregated.[27]

On remand, parents of Mexican-American students intervened. While equality was important to those Mexican-American parties, equal educational opportunities also meant maintaining racial balancing that would sustain "critical numbers" of Spanish as the primary language students necessary to maintain bilingual education programs.[28]

The district court agreed with the Mexican-American intervenors and while ordering desegregation through most of the district, the court retained some schools with a majority Mexican-American student population.[29] On appeal however, the Tenth Circuit ruled that although bilingual education programs might be

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[27] 413 U.S at 197-98.

[28] *Keyes v. School District No. 1*, 521 F.2d 465, 479-82 (10th Cir. 1975); *see also*, Antoinette Sedillo Lopez. Educating Our Children on Equal Terms: the Failure of the De Jure/De Facto Analysis in Desegregation Cases, 7 Chic. L. Rev. 1, 17-18 (1984); and Peter D. Roos, Bilingual Education: The Hispanic Response to Unequal Educational Opportunity, 42 Law & Contemp. Probs. 111, 134-40 (1978).

[29] *Keyes v. School District No. 1*, 80 F. Supp. 673, 692 (D. Colo. 1974).

important, bilingual education is not a substitute for desegregation.[30] The Tenth Circuit also noted that the Colorado legislature had mandated bilingual education anyway. Although the *Keyes* case remained in Federal court system for another 22 years—28 years altogether—the Supreme Court never considered the case again after 1973 despite other requests.[31] Accordingly, the ruling by the Tenth Circuit became law in that circuit.

The Tenth Circuit reached its result in *Keyes* following in part a ruling the previous year from the Supreme Court that refused to find that the Equal Protection Clause requires bilingual education, but rather relying on the Civil Rights Act of 1964 and regulations from the Department of Health, Education, and Welfare.[32] Bilingual education rests on a statutory rather than a constitutional footing.

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[30] 521 F.2d at 480.

[31] 423 U.S. 1066 (1976); 498 U.S. 1082 (1991). On July 18, 1997, the Tenth Circuit ended the *Keyes* litigation by finding that Denver's school district was unitary. 119 F.3d 1437, 1440 (10th Cir. 1997).

[32] *Lau v. Nichols*, 414 U.S. 563, 565-66 (1974).

3. Puerto Rico's Status and Hypocrisy in Pluralism

Since the United States took possession of Puerto Rico over 100 years ago after the Spanish-American War, Puerto Ricans have challenged aspects of American colonialism through the American legal system. Like public education, efforts to change or define Puerto Rico's status took center stage at the United States Supreme Court in the *Insular Cases*.[33] The most prevalent constitutional issue of the times involved the constitutionality of American colonialism and whether the Constitution follow the flag.[34] Between 1898 and 1902, at least 29 law review articles were published by prominent constitutional legal scholars in the Harvard Law Review, Yale Law Journal, and other law reviews dealing with the territories acquired in 1898.

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[33] For an extensive discussion of these, *see* JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 60-84 (1985).

[34] As Chief Justice Taft, wrote: "Few questions have been the subject of such discussion and dispute in our country as the status of our territory acquired from Spain in 1899. The division between the political parties in respect to it, the diversity of views of the members of this court in regard to its constitutional aspects, and to the constant recurrence of the subject in the House of Congress, fixed the attention of all on the future relation of this acquired territory to the United States." *Balzac*, 258 U.S. at 306.

3.1. The Territorial Incorporation Doctrine and the *Insular* Cases

Prior to 1900, it was "unquestionable" that the Bill of Rights applied to territories acquired by the United States.[35] However, in the *Insular Cases*, the Supreme Court judicially created the "Territorial Incorporation Doctrine." The main difference from prior territorial acquisitions was the large number of inhabitants of different races and cultures.[36] The "Territorial Incorporation Doctrine" judicially created a distinction between "incorporated" and "unincorporated" territories, legitimizing colonialism.[37]

3.2. Balzac Reaches the Supreme Court

Jesús Balzac published a newspaper called El Baluarte in Arecibo, Puerto Rico. On April 16 and April 23, 1918, Balzac wrote editorials about then Governor of Puerto Rico Arthur Yager,

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[35] *Thompson v. Utah*, 170 U.S. 343, 346-47 (1898).

[36] The racial and cultural components of the inhabitants of the newly acquired possessions of the United States were and have been controlling, if not *the* controlling issues, affecting how the United States has governed those territories. MICHAEL H. HUNT, IDEOLOGY AND U.S. FOREIGN POLICY, (1987).

[37] The sitting Chief Justice Fuller criticized the Territorial Incorporation Doctrine because it "assumes that the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original States and territories, and substitutes for the present system of republican government, a system of domination over distant provinces in the exercise of unrestricted power." *Downes v. Bidwell*, 182 U.S. 244, 373 (1901)(Fuller, C.J., dissenting).

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appointed by his Princeton classmate, Woodrow Wilson. At that time, Puerto Rican governors were selected by the United States, not elected.

The district attorney brought two misdemeanor criminal prosecutions against Mr. Balzac (one for each article) based on seditious libel. Although not felonies, these offenses carried a potential penalty of up to two years in jail and up to $500.00 in fines. The district attorney brought the claims based on "information" rather than following a grand jury indictment. In Puerto Rico at the time of the prosecution, no statute provided for a jury trial in misdemeanor offenses.

The district judge found Mr. Balzac guilty on both counts, and sentenced him to jail for nine months and to pay costs. Mr. Balzac's constitutional complaints were that, as an American citizen, he was entitled to a jury as guaranteed in the Sixth Amendment, and that imprisoning him based on his publication violated his free speech and free press rights guaranteed by the First Amendment.

Regarding the statements, the Puerto Rican Supreme Court said:

> The article transcribed in the information in this case is so violent in its invective [sic] that we do not see fit to reproduce it for the purposes of our

> records. Not only did a simple reading of it show that the Governor of Porto [sic] Rico was the subject of the attack, but that in half a dozen or more places of the article there were phrases that, if true would necessarily expose Arthur Yager to public hatred, contempt, or ridicule.[38]

Similarly, Chief Justice Taft, writing for a unanimous United States Supreme Court, dismissed the First Amendment claim in that case in a single paragraph.[39]

3.3. The hypocritical application of pluralism: *Balzac v. Porto [sic] Rico*

Chief Justice Taft started his opinion favorably to Mr. Balzac's position: "It is well settled that the provisions for jury trial in criminal and civil cases apply to the territories of the United States."[40] The opinion then takes a nose-dive, relying on the *Insular Cases* to conclude that the constitutional guarantees to a trial by jury does not apply to "unincorporated territories" like Puerto Rico. In denying Mr. Balzac's claim that he was

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[38] *People v. Balzac*, 28 P.R.R. 139, 140-41 (1920), *aff'd*, 258 U.S. 298 (1922).

[39] "A reading of the two articles removes the slightest doubt that they go far beyond the 'exuberant expressions of meridional speech'...Indeed they are so excessive and outrageous in their character that they suggest the query whether their superlative vilification has not overleapt itself and become unconsciously humorous. But this is not a defense." *Balzac*, 258 U.S. at 314.

[40] 258 U.S. at 304.

constitutionally entitled to trail by jury. Chief Justice Taft gave several pluralistic rationales, which will be discussed in turn.

3.3.1. Orderly administration of justice and deference to local customs

Chief Justice Taft feared that recognizing a constitutional right to trial by jury in Puerto Rico could "provoke disturbance" rather than aid the "orderly administration of justice."[41] What "disturbances" could arise from juries presiding over criminal cases? Chief Justice Taft also stated that in Puerto Rico, a long-established system of jurisprudence existed with fair and orderly trials without juries. Arguably, this is a pragmatic pluralistic position. There is some intuitive force in saying that federal constitutional requirements should not be "mechanically" applied where not appropriate. Furthermore, Chief Justice Taft argued that

[41] Note here the "disturbing" similarities with cases involving Puerto Rico and federal assistance. In *Harris v. Rosario*, 446 U.S. 651, 652 (1980) and *Califano v. Torres*, 435 U.S. 1, (1979) the Court said that one of the three rational factors permitting discriminatory federal funding to United States citizens in Puerto Rico was that: "greater benefits could disrupt the Puerto Rican economy." Some problems with this rationale are highlighted by Justice Marshall in dissent: "This rationale has troubling overtones. It suggests that programs designed to help the poor should be less fully applied in those areas where the need may be the greatest, simply because otherwise the relative poverty of recipients compared to other persons in the same geographic area will somehow be upset." *Harris*, 446 U.S. at 655-656 (Marshall, J., dissenting).

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since Puerto Rico was a civil code jurisdiction, imposing this Anglo-Saxon requirement would be disruptive.[42]

When analyzed, these rationales are ironic and hypocritical suggestions for not applying the constitutional criminal jury trial guarantees to the colonies. While the Supreme Court claims "respect and sensitivity" to the colony's culture and traditions by not applying the right to trial by jury, other parts of the Constitution, United States laws generally, and laws particularly invidious to the colonies such as restrictions on speaking the native language, or putting up the colony's local flag were imposed.[43]

Perhaps efficiency in administering justice was a tantamount concern, and forcing the jury system into "unincorporated" territories would force the courts to go through the cumbersome steps of jury selection and jury deliberations. However, the same concerns apply with equal force to juries within the fifty states. Most on point are Florida, Louisiana, Texas,

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[42] "Congress has thought that a people like the Filipinos or the Porto[sic] Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin." *Balzac*, 258 U.S. at 310.

[43] *See* RONALD FERNANDEZ, THE DISENCHANTED ISLAND: PUERTO RICO AND THE UNITED STATES IN THE TWENTIETH CENTURY (1992) . *Compare with Meyer v. Nebraska*, 262 U.S. 390 (1923).

California and other states that at one point were civil code jurisdictions without juries. When they became part of the United States, these entities were forced to adopt the right to a trial by jury. As Justice Harlan commented during one of the *Insular Cases*, "such inconveniences are of slight consequences compared with the dangers to our system of government arising from judicial amendments of the Constitution."[44] Chief Justice Taft's hypocritical opinion applies pluralist principles (respect for local self-government) where they are systematically denied.[45]

3.3.2. An effective jury system requires trained, responsible citizens

Chief Justice Taft also reasoned that jury duty requires participation in self-governance and since the territories are unfit for self-government, the jury system does not really fit either. Chief Justice Taft wrote: "In common-law countries centuries of tradition have prepared a conception of the impartial attitude jurors must assume."[46] While Puerto Ricans and others may not have

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[44] *Dorr*, 195 U.S. at 155 (Harlan, J., dissenting).

[45] For some examples in the Native American context, *see Duro v. Reina*, 495 U.S. 676, 693 (1990) (Indian tribal governments have no criminal jurisdiction to punish non-tribal members); *Santa Clara Pueblo v. Martinez*, 436 U.S. 52 (1978)(recognizing "tribal sovereignty" to discriminate against women).

[46] *Balzac*, 258 U.S. at 310.

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centuries of training in "common law notions of fairness and impartiality", by that time Puerto Rico's colonial inhabitants had served in juries in Federal courts and in felony cases since September 20, 1899.[47] If the U.S. intended to promote self-government in Puerto Rico and to bring the "blessings of enlightened civilization"[48], what apart from voting could be better than jury service?

The *Balzac* case also resembles a situation in the early colonial history of the United States, the *Zenger* case. The most glaring similarities between unincorporated territories and the American colonial experience regarding the importance of criminal juries are found in cases involving core First Amendment rights—political speech. Balzac's prosecution was similar to the British prosecution of Peter Zenger, the publisher of the first major

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[47] CARMELO DELGADO CINTRON, DERECHO Y COLONIALISMO, (1988).

[48] This language comes from a speech by General Nelson Miles upon arriving in Puerto Rico with the United States' invasion force in 1898 where he says: "We have not come to make war upon the people of a country that for centuries has been oppressed, but, on the contrary, to bring you protection, not only to yourselves but to your property, to promote your prosperity, and to bestow upon you the immunities and blessings of the liberal institutions of our government...This is not a war of devastation, [but] to give all within the control of its military and naval forces the advantages and blessings of enlightened civilization."

independent and opposition newspaper in the United States for seditious libel, by indictment, without a grand jury.[49]

3.4. *Balzac*'s hypocritical pluralism endures

Although some scholars claim that the Supreme Court would overrule *Balzac*[50], *Balzac* and the "Territorial Incorporation Doctrine" remain the law, and Chief Justice Rehnquist approvingly cited it in 1990.[51] Most recently, a federal circuit court followed *Balzac* on December 29, 1998.[52] The right to a jury trial in criminal prosecutions in cases involving political offenses.[53]

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[49] The trial of John Peter Zenger is infamous in American constitutional history. Zenger was a German immigrant who published the *New York Weekly Journal*, and was tried for seditious libel in connection with some articles criticizing the colonial governor of New York, William Cosby. On the trial, see VINCENT BURANELLI, THE TRIAL OF PETER ZENGER (1957); and JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (1963) . The *Zenger* trial allowed a local jury to determine whether written articles constituted libel against the colonial government, and although Zenger was "guilty", the jury disregarded or "nullified" the existing law. On the significance of the trial *See* Amar, *Fourteenth Amendment*, *supra*, at 1277, 1282-83. This case also resembles *Dorr v. U.S.*, 195 U.S. 138, 149 (1904), a criminal prosecution for libel against two editors of *Manila Freedom*, a Filipino newspaper. The allegedly libelous statements were also against a member of the government.

[50] David M. Helfeld, *How Much of the U.S. Constitution and Statutes are Applicable to the Commonwealth of Puerto Rico?*, 110 F.R.D. 452, 458 (1985). *But see King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975).

[51] *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 268-70 (1990).

[52] *U.S. v. Kole*, 164 F.3d 164, 167 (3rd Cir. 1998).

[53] *See* RONALD FERNANDEZ, THE DISENCHANTED ISLAND 127-29, 186 (1992).

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4. Pluralism On Trial in Jury Selection

Other than voting, jury service is one of the primary duties and privileges of U.S. citizenship. Juries are crucial in the American legal system: the Bill of Rights and the Constitution mention the right to a jury trial on four separate occasions. The paradigmatic image underlying the Bill of Rights is the jury.[54] In one of the first major equal protection cases considered by the Supreme Court, it held that the Constitution forbade discrimination in jury service and struck down a West Virginia statute excluding African-Americans from juries as violating the Equal Protection Clause.[55]

4.1. The unconstitutionality of peremptory strikes based on forbidden criteria such as race, gender, or religion

In 1986, the Supreme Court expanded the Equal Protection Clause's mandate of equal treatment in jury selection to the peremptory challenges prior to trial.[56] In order to ensure a fair and impartial panel, some prospective jurors are struck "for cause."

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[54] Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1190 (1991).

[55] *Strauder v. West Virginia*, 100 U.S. 303 (1879).

[56] *Batson v. Kentucky*, 476 U.S. 79 (1986).

Jurors are generally struck "for cause" if they: 1) confess a bias, for or against one party or attorney or another; 2) admit a predetermination of guilt or innocence or that they have prejudged the merits of the case; and/or 3) declare an inability to render a fair and impartial verdict based on the evidence.[57]

In addition to striking "for cause", the parties may use "peremptory challenges" which are additional strikes given to each party,

> Without a reason stated, without inquiry, and without being subject to the court's control. While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable.[58]

Batson overruled *Swain*[59] and held that intentional exclusion of black jurors by the prosecution violated the Equal Protection Clause. The Supreme Court expanded *Batson*: so that a person need not be a member of the excluded group to establish a *Batson*

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[57] WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 973-4 (2d ed. 1992).

[58] *Swain v. Alabama*, 380 U.S. 202 (1965)(rejecting defendant's Equal Protection claim that the prosecutor's removal of all six blacks from the jury was unconstitutional).

[59] 476 U.S. at 93-100.

violation[60]; to civil cases[61]; to criminal defendants[62]; and to gender discrimination.[63]

4.2. *Hernández v. New York*: ¿Como?

The *Batson* case from the Supreme Court that most impacts Latinos and their participation in juries is *Hernández v. New York*.[64] In *Hernández*, the defendant challenged that the prosecutor exercised peremptory challenges to exclude Latinos from the jury by reason of their ethnicity.[65] The Court admitted that if true, under *Batson*, the peremptory strikes would have violated the Equal Protection Clause.[66] To that extent, *Hernández* extends *Batson* to Latinos based on equality values.

However, the majority in *Hernández* held that the prosecutor's use of peremptory strikes in that case did not violate equal protection because the prosecutor's grounds were based on

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[60] *Powers v. Ohio*, 499 U.S. 400, 415 (1991).

[61] *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628-31(1991).

[62] *Georgia v. McCollum*, 505 U.S. 42, 50-57 (1992)

[63] *J.E.B. v. Alabama*, 511 U.S. 127, 140-46(1993).

[64] 500 U.S. 352 (1991).

[65] 500 U.S. at 355-57.

[66] 500 U.S. at 355.

non-prohibited criteria, mainly that the prospective jurors spoke Spanish and would not be able to accept the English translation of testimony from Spanish witnesses.[67] Under the *Batson* system, like in employment discrimination cases, once a challenge is raised, the burden shifts to the striking party, who must show a race-neutral purpose. Then, the trial court must determine whether the defendant proved purposeful discrimination. A *Batson* challenger must prove *discriminatory purpose or intent*, not merely a *disproportionate impact* to a particular group.

The Supreme Court accepted the prosecutor's "race-neutral" explanation of "two categories" (those who persuaded the prosecutor that "they might have difficulty in accepting the translator's rendition of Spanish-language testimony" and those who did not) because the challenges rested neither on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about Latinos or bilinguals.[68] In support of its reasoning, the Supreme Court cited an exchange from a juror in a

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[67] 500 U.S. at 360-63.

[68] 500 U.S. at 360-66.

Ninth Circuit case during trial where the juror challenged the translator's rendition of the testimony.[69]

Hernández effectively allows parties to eliminate Spanish-speaking bilinguals from jury duty when there is translated testimony based on an absurd application of pluralism. [70] However, the Supreme Court claims it does not: "Our decision today does not imply that exclusion of bilinguals from jury service is wise, or even that it is constitutional in all cases."[71] The Court acknowledged that its ruling created "a harsh paradox that one may become proficient enough in English to participate in trial, only to encounter disqualification because he knows a second language as well."[72] The Supreme Court also gave an insight into its view of language minorities

> Just as shared language can serve to foster community; language differences can be a source of division. Language elicits a response from others ranging from admiration to respect, to distance and alienation, to ridicule and scorn. Reactions of the

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[69] 500 U.S. at 360 n.3, *citing, U.S. v. Perez*, 658 F.2d 654, 662 (9th Cir. 1981).

[70] For a thoughtful discussion on the problems with the *Hernández* case, see Juan F. Perea, *Hernández v. New York*: Court, Prosecutors, and the Fear of Spanish, 21 Hofstra L. Rev. 1 (1992).

[71] 500 U.S. at 371.

[72] *Id.*

> latter type all too often result from or initiate racial hostility.[73]

Justices Stevens argued in dissent that language can be nothing more than "a proxy for a discriminatory practice."[74]

5. Conclusion

While the Supreme Court recognized Latinos as a "protected class" for equal protection purposes, it has rejected or misused pluralism in cases involving Latinos.

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[73] *Id.*

[74] *Id.* at 379 (Stevens, J., dissent).